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HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 393

STATE OF TENNESSEE, RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CAROLINA CLINCHFIELD AND OHIO RAILWAY, ETC., ET AL.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

REPLY OF INTERVENING RAILROADS, APPELLEES, TO PETITION OF APPELLANTS FOR REHEARING

James A. Bistline,
A. J. Dixon,
Frank W. Gwathmey,
M. T. Hastings,
Edwin F. Hunt,
Prime F. Osborn,
William H. Swiggart,
Charles P. Reynolds,
Counsel for Intervening Railroads, Appellees.

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STATE OF TENNESSEE, ET AL.

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UNITED STATES OF AMERICA, ET AL.

REPLY OF INTERVENING RAILROADS, APPELLEES, TO PETITION OF APPELLANTS FOR REHEARING

The intervening railroads, appellees, respectfully submit the following as their reply to appellants' petition for rehearing.

This case involves an order of the Interstate Commerce Commission, issued under Sections 13(3)(4) and 15a(2) of the Interstate Commerce Act (49 U. S. C., Sections 13 (3)(4) and 15a(2)), requiring the intrastate rates on coal and pulpwood within the State of Tennessee to be increased by the amounts authorized in Ex Parte No. 166, *Increased Freight Rates, 1947,* 270 I. C. C. 403, and Ex Parte No. 168, *Increased Freight Rates, 1948,* 276 I. C. C. 9. In the proceedings just cited the Commission found that the interstate freight rates and charges of the railroads of the United States should be increased by the

amounts there authorized in order that the objectives of Section 15a(2) and the National Transportation Policy might be attained. And its reports make it clear that the Commission also contemplated that the same increases should be applied to intrastate freight rates and charges throughout the United States. *Increased Freight Rates, 1947*, 270 I. C. C. 403, 463; *Increased Freight Rates, 1948*, 276 I. C. C. 9, 13, 18-24. See also *King* v. *United States*, 344 U. S. 254, 257-258.

Appellants sought to enjoin and set aside the order of the Commission, on the ground that it was not supported by adequate findings and that the findings were not supported by the evidence. But a specially constituted three-judge District Court concluded that the order was supported by the evidence and by adequate findings and dismissed the complaint. *State of Tennessee* v. *United States*, 113 F. Supp. 634. In holding the Commission's findings adequate the District Court relied upon this Court's decisions in *United States* v. *Louisiana*, 290 U. S. 70, and *King* v. *United States*, 344 U. S. 254.

Appellants then appealed to this Court, and the Interstate Commerce Commission and the intervening railroads filed motions to affirm. By order of November 30, 1953, the Court granted the motions to affirm. Appellants have now filed a petition for rehearing in which they limit their attack to the Commission's findings with respect to the Tennessee intrastate rates on coal.

The petition for rehearing is based on the following statement (pp. 1-2):

> "The Tennessee Valley Authority introduced substantial and uncontradicted evidence at the hearing before the Interstate Commerce Commission that the intrastate rates on coal were already higher than the interstate rates and were returning a greater margin above cost, but the Interstate Commerce Commission

made no finding as to the relative levels of the interstate and intrastate rates."

The above statement is wholly incorrect. The Interstate Commerce Commission considered the contentions made by the Tennessee Valley Authority with respect to the relative levels and profitableness of the interstate and intrastate coal rates and made the following statement in regard thereto (286 I. C. C. 54):

> "In support of its contentions that intrastate coal rates in Tennessee are generally as high or higher than interstate coal rates, and that the going intrastate coal rates are more remunerative to the respondents than the interstate rates, the Tennessee Valley Authority relies upon computations based upon excerpts from the Carload Waybill Analyses, 1948, Statement No. 5032 and Statement No. 5028, issued in June 1950, by our Bureau of Transport Economics and Statistics. The computations were made by witnesses who could not give any of the shipping points covered by the statements or the transportation conditions or circumstances surrounding the movements or the establishment of the rates charged. The cost computations were also made in connection with excerpts from the waybill analyses statements. The traffic statistics included both intrastate and interstate movements. In the circumstances, the computations do not support conclusively these contentions. The evidence of record supports the conclusion that the respondents, after the decision of 1925 in the southern class rate investigation, adopted and have since followed the policy of maintaining intrastate rates throughout southern territory on the same relative level as interstate rates on practically all commodities. With respect to Tennessee, the exceptions are due to the action of the Tennessee commission in refusing to permit the intrastate rates on certain commodities to be increased to the full extent authorized in the interstate rates."

The evidence of record plainly shows that the Tennessee intrastate rates on coal are not in excess of the interstate rates to, from, and between points in Tennessee. For example, the tabulation on page 14 of our motion to affirm shows that the intrastate rates required by the order of the Interstate Commerce Commission are less than the interstate rates prescribed by that Commission to, from, or between points in Tennessee in *Anderson Bros. & Foster* v. *Alabama Central R. Co.*, 206 I. C. C. 175, and *Carolina Coal Consumers Conference* v. *A. & R. R. Co.*, 270 I. C. C. 191. In cases decided since the close of the hearing in the instant case the so-called Anderson Bros. & Foster Scale has been prescribed on coal moving from origins in western Kentucky to additional destinations in Tennessee. *Kentucky Coal Agency, Inc.* v. *Alabama Great Southern Ry. Co.*, 283 I. C. C. 175, and *Mead Corporation* v. *Southern Railway Co.*, 286 I. C. C. 66. The fact is that the interstate and intrastate coal-rate adjustments have been in effect for more than fifty years and competition between the various groups of mines is keen (286 I. C. C. 48). The Tennessee Commission would not have permitted the intrastate rates to exceed the interstate rates.

The evidence further shows that the conditions incident to the intrastate transportation of freight in Tennessee are not more favorable than the conditions incident to its interstate transportation to, from, and between points in that State. In other words, the cost of handling intrastate traffic is as great as, or greater than, the cost of handling interstate traffic (286 I. C. C. 45, and Finding 1).

The Commission found specifically, among other things, that the intrastate rates on coal "are not contributing their fair share of the revenues required by respondents" and "are causing undue, unreasonable, and unjust discrimination against interstate commerce" (Finding 4); that the discrimination should be removed by applying to

the intrastate rates on coal the same "increases as authorized thereon in Ex Parte Nos. 166 and 168" (Finding 5); and that the addition of said increases "will not result in unreasonable rates or charges, or rates and charges that are unreasonable in relation to interstate rates and charges and will substantially increase the respondents' revenues" (Finding 6).

These findings, when considered in the light of the evidence of record and what was said with respect to the contentions of the Tennessee Valley Authority concerning the relative levels and profitableness of the interstate and intrastate rates, make it plain that the Commission concluded and found that the intrastate rates on coal were not higher or more profitable than the interstate rates. The findings made are clearly sufficient to sustain the Commission's order, and they also meet the requirements of the Administrative Procedure Act. *King* v. *United States*, 344 U. S. 254; *United States* v. *Louisiana*, 290 U. S. 70; and *Capital Transit Co.* v. *United States*, 97 F. Supp. 614.

WHEREFORE, the premises considered, the intervening railroads, appellees, pray that appellants' petition for rehearing be denied.

Respectfully submitted,

JAMES A. BISTLINE,
A. J. DIXON,
FRANK W. GWATHMEY,
M. T. HASTINGS,
EDWIN F. HUNT,
PRIME F. OSBORN,
WILLIAM H. SWIGGART,
CHARLES P. REYNOLDS,
Counsel for Intervening Railroads, Appellees.